

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.F., Appellant**

**and**

**DEPARTMENT OF DEFENSE, EDUCATION  
ACTIVITY, Alexandria, VA, Employer**

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**Docket No. 15-0360  
Issued: July 1, 2015**

*Appearances:*

*Martin Kaplan, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

COLLEEN DUFFY KIKO, Judge

ALEC J. KOROMILAS, Alternate Judge

**JURISDICTION**

On December 8, 2014 appellant, through counsel, filed a timely appeal from an August 25, 2014 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>2</sup>

**ISSUE**

The issue is whether appellant met his burden of proof to establish disability for the periods April 7 through July 11, 2013 and September 7, 2013 through May 30, 2014 causally related to his employment injuries.

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> The Board notes that, following the issuance of the August 25, 2014 OWCP decision, appellant submitted new evidence. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. See 20 C.F.R. § 501.2(c)(1).

On appeal, counsel contends that appellant was not capable of performing his light-duty position, which required climbing ramps and stairs and did not include weight restrictions on pushing and pulling. He further contends that the second opinion report lacks probative value as it was based on an incomplete statement of accepted facts, which did not include appellant's bilateral osteoarthritis of the hands (wrists) condition.

### **FACTUAL HISTORY**

OWCP accepted that appellant, then a 34-year-old tractor operator, while in the performance of duty sustained a fracture of the left index finger on November 7, 1989 and tenosynovitis of the left hand and wrist on March 19, 1990. Appellant returned to work as a modified custodial worker on March 18, 1991. OWCP further accepted that he sustained a right carpal navicular hairline fracture on March 21, 1991 while taking out the trash in the performance of duty. By decision dated February 7, 2005, it accepted that appellant had sustained a recurrence of total disability on August 10, 2004. On April 24, 2013 appellant's claim was expanded to include left carpal tunnel syndrome and left tardy ulnar nerve.

The record reveals that appellant has a prior case referencing a right wrist and right foot injury under File No. xxxxxx508 (date of injury September 8, 1997).<sup>3</sup> Appellant received a schedule award for 22 percent permanent impairment of the left upper extremity and authorization for left wrist surgery, which he underwent on July 12, 2013.

Appellant filed a claim for compensation (Form CA-7) for the period October 29, 2012 through July 16, 2013. He submitted an April 18, 2013 report from Dr. Brian Battersby, a Board-certified orthopedic surgeon, who diagnosed carpal tunnel syndrome and tardy ulnar nerve, indicating that appellant had been treated for tenosynovitis following an employment injury resulting in a navicular fracture.

In a July 18, 2013 letter, OWCP requested additional medical evidence establishing appellant's disability for work during the period claimed and afforded him 30 days to respond to its inquiries.

Appellant submitted a July 9, 2013 report from Dr. Battersby who diagnosed left carpal tunnel syndrome, pain in joint involving hand, closed fracture of navicular (scaphoid) bone of the wrist, and lesion of the ulnar nerve. Dr. Battersby indicated that appellant complained of left hand and wrist pain and recommended surgery.

By decision dated August 22, 2013, OWCP denied appellant's claim for disability for the period October 29, 2012 through July 16, 2013 on the basis that the medical evidence submitted was not sufficient to support disability due to the employment injuries.

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<sup>3</sup> Under File No. xxxxxx508, OWCP accepted a right wrist sprain and right foot sprain as a result of falling to the ground while washing windows on a ladder in the performance of duty as a custodial worker. Appellant's case was closed, however, because the evidence of record established that he returned to work on October 14, 1997.

On May 29, 2014 appellant requested reconsideration and submitted reports dated October 9, 2013 through April 8, 2014 from Dr. Battersby who indicated that appellant continued to suffer from pain in her left hand and wrist, and diagnosed osteoarthritis.

Appellant filed a claim for compensation (Form CA-7) for the period April 7, 2013 through May 30, 2014.

In a June 23, 2014 letter, OWCP requested additional medical evidence establishing appellant's disability for work during the period claimed and afforded him 30 days to respond to its inquiries.

OWCP referred appellant, along with a June 6, 2014 statement of accepted facts, to Dr. Robert Moore, a Board-certified orthopedic surgeon, for a second opinion evaluation to determine the nature and extent of his employment-related conditions. In a July 8, 2014 report, Dr. Moore conducted a physical examination and reviewed appellant's medical history and a statement of accepted facts. He found mildly limited range of motion of both wrists and diagnosed osteoarthritis in both wrists, more severe on the left than the right, bilateral cubital tunnel syndrome, and right carpal tunnel syndrome. Dr. Moore advised that appellant was capable of working with the following restrictions: no pushing, pulling, or lifting greater than 20 pounds; no climbing.

A position description of the modified custodial worker position dated June 10, 1997 included the following restrictions: walking no more than four hours a day; lifting no more than 15 pounds; bending no more than two hours a day; and a limited amount of climbing ramps and stairs.

In a July 25, 2014 addendum report, Dr. Moore reviewed the requirements of the modified custodial worker position and opined that it did not exceed appellant's medical limitations as the lifting and carrying requirements were limited to 15 pounds and no ladder climbing was required. He further opined that there was no evidence of significant complication related to the carpal tunnel release surgery on July 12, 2013 and he would, therefore, consider that appellant was able to return to modified duty as of September 6, 2013.

By decision dated August 6, 2014, OWCP vacated its August 22, 2013 decision in part because the medical evidence was sufficient to establish that appellant was disabled from work from July 12 through September 6, 2013 due to temporary total disability from his surgery. It affirmed its August 22, 2013 decision in part, however, because the evidence was not sufficient to establish that he was disabled prior to his surgery for the period October 29, 2012 through July 11, 2013.

By decision dated August 7, 2014, OWCP expanded appellant's claim to include the acceptance of bilateral osteoarthritis of the hands (wrists).

By decision dated August 25, 2014, OWCP denied appellant's claim for disability for the period April 7 through July 11, 2013 and September 7, 2013 through May 30, 2014 on the basis that the medical evidence submitted was not sufficient to support disability due to the

employment injuries.<sup>4</sup> It found that his work restrictions were being accommodated in a modified custodial worker position before he was terminated for cause on February 23, 1998 for failure to follow leave requesting procedures. OWCP noted that it had accepted appellant's disability for the period July 12 through September 6, 2013 in a prior decision dated August 6, 2014.<sup>5</sup>

### **LEGAL PRECEDENT**

Section 8102(a) of FECA<sup>6</sup> sets forth the basis upon which an employee is eligible for compensation benefits. That section provides: "The United States shall pay compensation as specified by this subchapter for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty...." In general the term "disability" under FECA means "incapacity, because of an employment injury, to earn the wages the employee was receiving at the time of injury."<sup>7</sup> This meaning, for brevity, is expressed as disability for work.<sup>8</sup> For each period of disability claimed, the employee has the burden of proving that he was disabled for work as a result of the accepted employment injury.<sup>9</sup> Whether a particular injury caused an employee to be disabled for employment and the duration of that disability are medical issues which must be proved by the preponderance of the reliable probative and substantial medical evidence.<sup>10</sup>

Disability is not synonymous with physical impairment, which may or may not result in an incapacity to earn wages. An employee who has a physical impairment causally related to his or her federal employment, but who nonetheless has the capacity to earn the wages he or she was receiving at the time of injury, has no disability as that term is used under FECA and is not entitled to compensation for loss of wage-earning capacity. The Board will not require OWCP to pay compensation for disability in the absence of any medical evidence directly addressing the particular period of disability for which compensation is claimed. To do so would essentially allow employees to self-certify their disability and entitlement to compensation.<sup>11</sup>

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<sup>4</sup> Appellant filed a claim for compensation (Form CA-7) for the period September 7, 2013 through August 28, 2014. By decision dated October 22, 2014, OWCP denied his claim for disability for the period May 31 through August 28, 2014 on the basis that the medical evidence submitted was not sufficient to support disability due to the employment injuries.

<sup>5</sup> On August 27, 2014 appellant, through counsel, requested reconsideration of OWCP's August 6, 2014 decision. By decision dated November 12, 2014, OWCP denied modification of its August 6, 2014 decision.

<sup>6</sup> 5 U.S.C. § 8102(a).

<sup>7</sup> 20 C.F.R. § 10.5(f). *See also William H. Kong*, 53 ECAB 394 (2002); *Donald Johnson*, 44 ECAB 540, 548 (1993); *John W. Normand*, 39 ECAB 1378 (1988); *Gene Collins*, 35 ECAB 544 (1984).

<sup>8</sup> *See Roberta L. Kaaumoana*, 54 ECAB 150 (2002).

<sup>9</sup> *See William A. Archer*, 55 ECAB 674 (2004).

<sup>10</sup> *See Fereidoon Kharabi*, 52 ECAB 291, 292 (2001).

<sup>11</sup> *Id.*

## ANALYSIS

The Board finds that the weight of the medical evidence, as represented by the second opinion physician Dr. Moore, fails to establish that appellant was disabled for the periods April 7 through July 11, 2013 and September 7, 2013 through May 30, 2014 causally related to his employment injuries.

OWCP accepted a fracture of the left index finger, tenosynovitis of the left hand and wrist, a right carpal navicular hairline fracture, a right wrist sprain and right foot sprain,<sup>12</sup> left carpal tunnel syndrome, left tardy ulnar nerve, and bilateral osteoarthritis of the hands (wrists). Appellant bears the burden of proof to establish through medical evidence that he was disabled during the claimed time periods and that his disability was causally related to the accepted injuries.<sup>13</sup> The Board finds that he submitted no rationalized medical evidence explaining how the employment injuries materially worsened or aggravated his medical conditions and caused him to be disabled for work for the periods April 7 through July 11, 2013 and September 7, 2013 through May 30, 2014.

In his July 8 and 25, 2014 second opinion reports, Dr. Moore found mildly limited range of motion of both wrists. He diagnosed osteoarthritis in both wrists, more severe on the left than the right, bilateral cubital tunnel syndrome, and right carpal tunnel syndrome. Dr. Moore advised that appellant was capable of working with the following restrictions: no pushing, pulling, or lifting greater than 20 pounds; no climbing. He reviewed the requirements of the modified custodial worker position and opined that it did not exceed appellant's medical limitations as the lifting and carrying requirements were limited to 15 pounds and no ladder climbing was required. Dr. Moore further opined that there was no evidence of significant complication related to the carpal tunnel release surgery on July 12, 2013 and he would, therefore, consider that appellant was able to return to modified duty as of September 6, 2013. His reports constitute the weight of the medical evidence.

On appeal counsel contends that appellant was not capable of his light-duty position, which required climbing ramps and stairs and did not include weight restrictions on pushing and pulling. In its August 25, 2014 decision, OWCP found that appellant's work restrictions were being accommodated in a modified custodial worker position before he was terminated for cause on February 23, 1998 for failure to follow leave requesting procedures. A position description of the modified custodial worker position dated June 10, 1997 included the following restrictions: walking no more than four hours a day; lifting no more than 15 pounds; bending no more than two hours a day; and a limited amount of climbing ramps and stairs.

Appellant further contends on appeal that the second opinion report lacks probative value as it was based on an incomplete statement of accepted facts, which did not include his bilateral osteoarthritis of the hands (wrists) condition. The Board finds that the statement of accepted facts was correct as it was prepared and presented to Dr. Moore before OWCP expanded appellant's claim. OWCP referred appellant to Dr. Moore for a second opinion examination

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<sup>12</sup> See *supra* note 3.

<sup>13</sup> See *supra* notes 9-10. See also *V.P.*, Docket No. 09-337 (issued August 4, 2009).

before it issued its August 7, 2014 decision accepting the bilateral osteoarthritis of the hands (wrists) condition. In fact, although the condition was not included in the statement of accepted facts and had not yet been accepted at the time of the second opinion evaluation, Dr. Moore did consider appellant's condition and diagnosed osteoarthritis in both wrists, which led to OWCP's expansion of the claim. Therefore, the Board finds counsel's arguments are not substantiated.

In his reports, Dr. Battersby diagnosed osteoarthritis, carpal tunnel syndrome, tardy ulnar nerve, pain in joint involving hand, closed fracture of navicular (scaphoid) bone of the wrist, and lesion of the ulnar nerve. He indicated that appellant had been treated for tenosynovitis following an employment injury resulting in a navicular fracture. Dr. Battersby reported that appellant continued to suffer from pain in his left hand and wrist and recommended surgery. The Board finds that he failed to provide a probative medical opinion on whether appellant was disabled on the dates at issue due to his accepted conditions. Dr. Battersby failed to provide a rationalized medical explanation as to why appellant had employment-related residuals and how the residuals of the employment injuries prevented him from continuing in his federal employment. Thus, appellant has not met his burden of proof to establish that he was disabled for work due to the employment injuries for the periods claimed.

Appellant has not submitted any rationalized medical evidence establishing that he was disabled for the periods April 7 through July 11, 2013 and September 7, 2013 through May 30, 2014 causally related to the accepted employment injuries. Thus, he has not met his burden of proof to establish that he is entitled to compensation for any disability.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish disability for the periods April 7 through July 11, 2013 and September 7, 2013 through May 30, 2014 causally related to his employment injuries.

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 25, 2014 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 1, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board